United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 11, 2004

TO : Cornele Overstreet, Regional Director
Region 28

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Wal-Mart Stores, Inc.
Case 28-CA-19476

This Section 8(a)(1) and (3) case was submitted for advice as to whether the Employer restrained and coerced employees in the exercise of their Section 7 rights, and whether it discriminated against union supporters, through its descriptions of employee eligibility for various benefits in its 2004 Associate Benefits Book. We conclude that the charge should be dismissed, absent withdrawal, because the language at issue does not threaten, restrain, or coerce employees in the exercise of their Section 7 rights, and there is no evidence that antiunion animus motivated the Employer's description of eligibility.

FACTS AND BACKGROUND

For approximately three consecutive years prior to the Employer's publication of its Associate Benefits Book for the year 2004, the annual publication included the following language regarding exclusion from various specified benefits: "Contractually excluded and certain other union represented associates are not eligible for coverage." The Respondent distributes the Associate Benefits Books to each employee annually. On February 28, 2003, Administrative Law Judge Gregory Z. Meyerson issued a decision in Cases 28-CA-16832, et al., finding, inter alia, that the Employer violated Section 8(a)(1) of that Act by including this language in the Associate Benefits Book.[1]

On June 12, 2003, after both parties had filed exceptions, the General Counsel filed a Motion to Sever Allegations Concerning Respondent's Benefit Handbook Language and to Remand that Portion of this Consolidated Matter to the Regional Director for Region 28 for the Purpose of Approving a Settlement Agreement. The Motion states that if the Board grants the Motion, that portion of Cases 28-CA-16832, et al., will be consolidated with other charges pending in Regions 26, 28, and 32 alleging that the

[1] Wal-Mart Stores, Inc., Cases 28-CA-16832, et al., slip op. at 51-54 (JD(SF)-19-03) (Feb. 28, 2003).

same language from pre-2004 versions of the Associate Benefits Book violates the Act. The Motion further states that all of the pending charges will be the subject of a comprehensive settlement agreement if the Motion is granted. The contemplated settlement agreement, which had been negotiated between the General Counsel and the Respondent, would require the Respondent to, inter alia, substitute the language found unlawful by the ALJ with the following: "Also excluded are employees who are members of a collective bargaining unit whose retirement benefits [or appropriately described benefit] were the subject of good faith collective bargaining," in future annual Associate Benefits Books. The settlement agreement would require similar changes to the Employer's intranet site and all other affected publications made available to its employees.

The Charging Parties in those cases, United Food and Commercial Workers International Union, AFL-CIO, CLC, and its affiliated Local Union 99R, filed an Opposition to the Motion. In addition, the Charging Party in the instant case, United Food and Commercial Workers Union Local No. 120, and six individuals filed a Motion to Intervene and Opposition to Motion to Sever and to Remand for Settlement Purposes, to which the General Counsel filed an Opposition. The Board has not yet ruled on the Motion to Sever or the Motion to Intervene.

The Employer's 2004 Associate Benefits Book at issue here does not include the language found unlawful by the ALJ in Cases 28-CA-16832, et al., but does include the exclusionary language described in the General Counsel's Motion to Sever, quoted above, when describing eligibility for both (1) health and welfare benefits, and (2) profit sharing and 401(k) benefits. As noted in the General Counsel's Motion to Sever, the eligibility language in the 2004 Associate Benefits Book is virtually identical to language held lawful in KEZI, Inc.[2]

ACTION

We conclude that the charge should be dismissed, absent withdrawal, because the revised eligibility language in the Employer's 2004 Associate Benefits Book is lawful under KEZI.[3] The Board there held similar language to be lawful, i.e., "The plan will exclude ... Employees who are members of a collective bargaining unit with whom retirement

[2] 300 NLRB 594 (1990).

[3] 300 NLRB at 595.

benefits were the subject of good-faith bargaining."[4] The Board reasoned that the quoted language did not indicate that employees would be excluded from retirement benefits merely for choosing to bargain about those benefits. Rather, the employer's announcement stated that employees would be excluded only upon the completion of good-faith bargaining. Similarly, in this case, the Employer's use of nearly identical language satisfies the Board's requirements that employees not be excluded merely for choosing to bargain, and that exclusion from benefits programs can occur only after the completion of good faith bargaining. Accordingly, the charge lacks merit and should be dismissed absent withdrawal.

The Charging Party argues that the exclusionary language constitutes a threat to the Employer's employees, none of whom are represented by a union, that they will lose the specified benefits automatically if there is collective bargaining. For the following four reasons, we disagree that the language can be viewed as such a threat. First, the words at issue do not provide for any loss of benefits absent the completion of "good faith collective bargaining." The eligibility language does not contemplate any changes at the commencement of bargaining, or in the absence of bargaining that meets the well-established requirements of good faith.[5] Second, because the challenged language is susceptible to a lawful interpretation, requiring the normal processes of collective bargaining, the Board would not interpret it as having an unlawful meaning.[6] Third, the eligibility description does not preclude the possibility that good faith bargaining could result in the employees' continued participation in the Employer's benefit plans. Indeed, bargaining during which an employer refuses to consider the unit employees' continued participation simply because they chose to engage in collective bargaining would be subject to a claim that the employer was not bargaining in good faith. Finally, as noted above, the Board found

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[4] 300 NLRB at 594.

[5] See KEZI, 300 NLRB at 595. See also Marquez v. Screen Actors Guild, 525 U.S. 33, 47 (1998) (use of statutory language in union-security clause "incorporates all of the refinements associated with the language, [and] is a shorthand description of workers' legal rights.")

[6] See, e.g., Liquid Carbonic Corp., 277 NLRB 851 (1985) (interpreting a successor employer clause in a collective-bargaining agreement so as not to require an application unlawful under Section 8(e) of the Act.)

that an employer's use of nearly identical language to describe eligibility for a benefit plan was lawful in KEZI.

The Charging Party contends, however, that KEZI is distinguishable because, unlike the Employer's unrepresented employees here, those employees were represented by a union that was negotiating the parties' first contract, and, because the benefit plan involved in KEZI was a new plan that never had been applied to the represented employees, those employees were not at risk of losing any previously enjoyed benefits. We disagree. The Board there noted that eligibility language will be considered lawful if it meets two requirements. First, the language must indicate that benefits for unionized employees are subject to negotiation. Second, the language must not suggest that employees will be excluded automatically and irrevocably based on their decision to engage in collective bargaining. Because the Employer's eligibility language in this case meets both requirements, it is lawful.

Thus, contrary to the Charging Party's arguments, the Board in KEZI did not base its decision on the fact that the employees were represented by a union, or on the fact that the benefit plan was newly created. Although the Board noted its concern for situations where eligibility language could have an impact on a group of unrepresented employees' initial decision to engage in protected activities, the specific example discussed there involved an employer's announcement that employees automatically would forfeit vested benefits if they chose to be represented by a union.[7] Because the instant case does not involve an announcement of automatic forfeiture, but rather asserts that the Employer will bargain in good faith regarding the benefit plans involved, the charge should be dismissed, absent withdrawal.

B.J.K.

[7] Solo Cup Co., 176 NLRB 823 (1969) (cited in KEZI, 300 NLRB at 595, fn. 5).